STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from Court of Appeals
Fitzgerald, P.J., Holbrook, Jr., and Cavanagh, JJ.

ROBERT F. DESHAMBO,

Plaintiff-Appellee,

and,

JENNIFER M. GRANHOLM, Attorney General of the State of Michigan, and MICHIGAN DEPARTMENT OF COMMUNITY HEALTH,

Intervening Plaintiff-Appellee,

v

NORMAN R. NIELSEN and PAULINE NIELSEN,

Defendants-Appellants,

and

CHARLES W. ANDERSON,

Defendant.

DOCKET NO. 122939-40

Court of Appeals Nos. 233853
consolidated with 233854
Lower Court No. 00-5127 NO

BRIEF ON APPEAL – INTERVENOR-APPELLEE

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

It is necessary to restate the facts on appeal for this Court to have an accurate and complete picture of the parties and occurrences giving rise to the appeal. Anderson, a recognized logger from the Northport area, was hired by the Nielsens [Defendants-Appellants] to clear some previously cut wood from their property, as well as fell some popple [or "poplar"] for profit. The Nielsens had trees logged from their property before and had a longstanding personal and business relationship with Anderson [dismissed contractor defendant]. Anderson, in turn, had two individuals assist him in this task. (Appellants' Appendix K, pp 126a –129a.) One of these individuals was DeShambo [Plaintiff-Appellee]. On March 1, 1997, Anderson felled a 50-foot tall and 10 inch in diameter tree on the Nielsen property that struck DeShambo while he was de-limbing some previously felled trees nearby. DeShambo's back was to Anderson. (Appellants' Appendix K, pp 132a-133a.) DeShambo suffered serious injuries resulting in paralysis and filed suit. The Michigan Department of Community Health [Intervenor-Appellee, hereinafter "MDCH"] expended funds for the care of DeShambo through the Medicaid program[1] and intervened in the proceedings. MDCH filed a complaint, along with a stipulation of intervention to protect its subrogation rights for Medicaid expenditures.[2] (Appellants' Appendix A, p 2a.) When MDCH pays for medical services under the Medicaid program, it seeks reimbursement for those expenses from a liable third party under its statutory subrogation right. MCL 400.106.

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[1] Medicaid is a jointly funded federal/state program for medical assistance. It is established by Title XIX of the Social Security Act, 42 USC §1396, *et seq*, to help eligible indigent persons to obtain health care. The federal government reimburses each state for a portion of its Medicaid expenditures, 42 USC § 1396b, so long as it operates in accordance with program requirements. *Harris v McRae*, 448 US 297, 301 (1980). Medicaid should not be confused with Medicare which is completely administered federally.

[2] When MDCH filed its complaint on May 8, 2000, its Medicaid expenditures were $44,356.21. To date, the expenditures stand at $75,679.73.

Workers' compensation was not available in this case. (Appellants' Appendix I, pp 66a; Appendix K, p 123a.)

The Nielsen farm, where the timber operation took place, is comprised of 130 acres. (Appellants' Appendix L, p 54a.) The property has been in the Nielsen family for some time. The Nielsens returned to the farm after Norman Nielsen's retirement. (Appellants' Appendix L, p 150a.) There were about 1,500-2,000 cherry trees planted on the farm. (Appellants' Appendix L, p 1541.) The trees are planted on about 30 acres and the remaining approximately 100 acres are fallow. (Appellants' Appendix L, p 155a.) The daily cherry orchard operations are conducted by an outside individual, Charles Deering. (Appellants' Appendix L, p 154a.) Norman Nielsen is involved in some of the marketing decisions regarding the sale of the cherries. (Appellants' Appendix L, 154a.) However, the timber being felled on the Nielsen property was not related to the cherry trees but involved the wooded fallow land.

The Nielsens had timber operations done on the land in the 1970s. (Appellants' Appendix L, p 156a.) Another timber operation was conducted around 1994. The Nielsens were compensated in an amount of approximately $5,000.00 for the 1994 timber operation. (Appellants' Appendix L, p 157a.) Approximately 20 acres had been felled. (Appellants' Appendix L, p 158a.)

Anderson and DeShambo were engaged in "pulpwooding" on the Nielsens' property on March 1, 1997, the date DeShambo was struck by a felled tree. Pulpwooding is "cutting small-diameter timbers for paper purposes." As in this case, while pulpwooding, one individual is felling and the other is de-limbing. (Appellants' Appendix K, p 125a.) Anderson testified that to make money on cutting popple [the kind of tree that Anderson was cutting for pulpwooding], a

fair amount has to be cut. He further testified that when cutting popple one can be moving quickly. (Appellants' Appendix K, p 143a.)

Anderson testified at his deposition that he was to enter the Nielsens' property and to clean up hardwood tops to make firewood and cut popple trees (Appellants' Appendix K, pp 126a, 141a.) Anderson had done tree cutting on the Nielsen property "for years." Apparently, another logger had come onto the Nielsens' property and had done a poor job logging that needed to be cleaned up. (Appellants' Appendix K, p 141a.) Norman Nielsen was aware the prior logger had done a poor job. (Appellants' Appendix K, p 127a.)

Norman Nielsen took Anderson out to the tract of land and discussed the matter. Norman Nielsen instructed Anderson which patch of popple he could take as additional compensation; something he had done before. (Appellants' Appendix K, p 141a.) Anderson testified that Norman Nielsen "threw the popple in to sweeten the pot." (Appellants' Appendix K, p127a.) It is undisputed that the Nielsens were to be compensated from the sale of the felled timber. (Appellants' Appendix L, pp 158a, 160a.)

It is not disputed that Norman Nielsen and Anderson did not discuss safety procedures and precautions, and the Nielsens were not present on March 1, 1997. (Appellants' Appendix L, p 160a.) However, Norman Nielsen did recognize that cutting trees could be "kind of a risky thing." (Appellants' Appendix L, p 161a.)

Anderson testified at his May 24, 2000, deposition that working in the woods is a dangerous occupation and business. (Appellants' Appendix K, pp 138a, 142a.) In his deposition he described a variety of safety measures that are necessary because of the dangers of felling the timber. (Appellants' Appendix K, pp 124a-125a.) A foremost danger is being in the vicinity of a falling tree. (Appellants' Appendix K, p 125a.) This danger is compounded by the fact that

the individual actually felling the tree is using a dangerous chainsaw and must also be concerned with his own safety. (Appellants' Appendix K, p 135a.) Anderson acknowledged that safety is a primary concern. (Appellants' Appendix K, p 143a.)

Through Anderson's deposition testimony and Offer of Proof made in conjunction with DeShambo's Response to the Motion for Summary Disposition, evidence was presented that felling timber is inherently dangerous. DeShambo and Anderson were engaged in the activity of felling timber on the Nielsens' property on March 1, 1997. While felling timber DeShambo suffered injuries leading to paralysis. In opposition to the Nielsens' Motion for Summary Disposition, DeShambo made an Offer of Proof consisting of a report entitled, "Logging is Perilous Work," U.S. Department of Labor, Bureau of Labor Statistics, dated December 1998. (Intervenor-Appellee's Appendix A.) This report indicated that "logging" has consistently been the 1st or 2nd most dangerous occupation in the United States. Were the matter to go to trial, DeShambo intended to present the testimony of Eric F. Sygnature, as author of the report, or another representative of the U.S. Department of Labor. This report was furnished to all parties and to the circuit court. Further, Anderson, an experienced timber cutter, testified at his deposition that working in the woods is a dangerous occupation and business. (Appellants' Appendix K, pp 138a, 142a.)

The circuit court entertained oral argument on the Nielsens' Motion for Summary Disposition on September 25, 2000, and January 8, 2001. (Appellants' Appendix H, p 29a; Appendix I, p 63a.) On January 8, 2001, the circuit court concluded on the record that the felling of timber did not qualify as an inherently dangerous activity for which liability could attach to the Nielsens. (Appellants' Appendix I, pp 88a-89a.) The circuit court entered the Order on January 29, 2001. (Appellants' Appendix D.) The January 29, 2001, Order became final on

April 4, 2001, when the circuit court entered an Order resolving all issues and claims to all remaining parties. (Appellants' Appendix E.) DeShambo and MDCH appealed as of right, to the Michigan Court of Appeals. (Appellants' Appendix B, p 5a.) The matter was briefed by the parties. Oral argument was heard before the Court of Appeals on October 2, 2002. Counsel for MDCH and DeShambo appeared and presented argument. Counsel for the Nielsens did not appear, although endorsed for argument. By way of a *per curiam* unpublished opinion, the Court of Appeals reversed the circuit court and remanded the matter holding that a material question of fact existed as to what the Nielsens' knowledge of risks involving the logging was at the time of the agreement with Anderson. The Court noted for purposes of the remand, that because evidence was presented regarding the inherent dangers of felling timber, the question of whether felling timber is inherently dangerous is one for the jury. The Court also noted that in past cases discussing whether an activity had to be "unusual", the issue was not dispositive. (Appellants' Appendix F, pp 25a-27a.) The Nielsens filed a motion for rehearing that was also denied by the Court of Appeals on December 4, 2002. (Appellants' Appendix G.) The Nielsens filed the current Application for Leave to Appeal that was granted by this Court on November 6, 2003.

ARGUMENT

I. Employees of independent contractors engaged in an inherently dangerous activity can recover against the property owner

A. Origins of the inherently dangerous activity doctrine in Michigan

The inherently dangerous activity doctrine is an exception[3] to the general rule that an employer of an independent contractor is not liable for the contractor's negligence or the negligence of his employees." *Bosak v Hutchinson,* 422 Mich 712, 724; 375 NW2d 333 (1985). The doctrine has been called "akin" to strict liability. *Id.* at 726. *Inglis v Millerburg Driving Ass'n,* 169 Mich 311; 136 NW 443 (1912), is the first case to analyze and state the exception in detail. The doctrine has been applied to the employee of an independent contractor. *Vannoy v City of Warren,* 15 Mich App 158; 166 NW2d 486 (1968) (*lv den*, 382 Mich 768). *McDonough v General Motors Corp,* 388 Mich 430; 201 NW2d 609 (1972); *Warren v McLouth Steel Corp,* 111 Mich App 496, 503-504; 314 NW2d 666 (1981). The question of whether the doctrine should apply to employees of an independent contractor is best understood by reviewing the components of the doctrine, cases where it was found to apply and any countervailing arguments.

It is helpful to start the analysis of whether the inherently dangerous activity doctrine should apply to employees of the independent contractor with the benchmark *Inglis* case, *supra,* because it laid out the doctrine. The *Inglis* case involved a suit over damage to the plaintiff's land caused by fires set by an independent contractor on defendants' land. 169 Mich at 312-314.

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[3] Other separate and distinct theories exist as exceptions to the general rule of nonliability. *See Phillips v Mazda Motor Mfg (USA) Corp,* 204 Mich App 401, 408; 516 NW2d 502 (1994) [involving retained control]; *Funk v Gen Motors Corp,* 392 Mich 91, 104; 220 NW2d 641 (1974) *overruled* in part on other grounds, *Hardy v Monsanto Enviro-Chem Systems, Inc,* 414 Mich 29; 323 NW2d 270 (1980) [dangers in common work areas]. These theories are not mutually exclusive. Only the inherently dangerous activity doctrine is at issue in this appeal.

Plaintiff appealed after the trial court entered a directed verdict in the defendants' favor. *Id.* at 314. The Court reversed the trial court and ordered a new trial. *Id.* at 322.

In reaching its conclusion that the employer of an independent contractor could be liable for damages caused by the acts of an independent contractor, the Court in *Inglis* quoted and considered contemporary treatises and case law.

> "If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think, to be responsible, * * * for I cause acts to be done which naturally expose others to injury." 2 Cooley on Torts (3d Ed.), p. 1091. This exception was recognized in a recent case by this court (*Rogers* v. *Parker,* 159 Mich., at pages 282 and 283 [123 N.W. 1111, 34 L.R.A. (N.S.) 955, 18 Am. & Eng. Ann. Cas. 753]), where the following quotation taken from an eminent author is quoted: "So it is the duty of every person who does in person, or causes to be done by another, an act which from its nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are taken, and he cannot escape this duty by turning the whole performance over to a contractor, etc. Mechem on Agency, § 747, and cases cited." In 26 Cyc. pp. 1559, 1560, this rule is recognized, and the cases there cited amply sustain it:
>
> "Where the work is dangerous of itself, or as often termed, 'inherently' or 'intrinsically' dangerous, unless proper precautions are taken, liability cannot be evaded by employment of an independent contractor to do the work. Stated in another way, where injuries to third persons must be expected to arise, unless means are adopted by which such consequences may be prevented, the contractee is bound to see to the doing of that which is necessary to prevent the mischief. The injury need not be a necessary result of the work, but the work must be such as will probably, and not which merely may, cause injury if proper precautions are not taken." It is suggested that to hold in accordance with this recognized exception to the general rule applied in the case of an independent contractor is to abrogate the rule as followed by this court. It would seem that a careful consideration of what has been said in this opinion, and of the authorities cited, is a sufficient answer to such suggestion. Mr. Justice BLAIR, speaking for this court, in *Rogers v. Parker, supra*, a case framed entirely upon the statute, from which we in this opinion have taken this quotation from Mechem, *supra,* said: "It seems evident that the liability of the owner of lands for negligently permitting fire to escape there from is predicated upon his knowledge of the existence of a fire thereon, or, at least, of knowledge of facts which would charge him with notice that the danger of such fire breaking out thereon was imminent. This record is barren of any such evidence." The Supreme Court of Ohio in a well-considered case has approved this doctrine, quoting from the leading English cases: "The doctrine of independent contractor, whereby one who lets work to be done by

another, reserving no control over the performance of the work, is not liable to third persons for injuries resulting from negligence of the contractor or his servants, is subject to several important exceptions. One of these, applicable as we think to this case, is where the employer is, from the nature and character of the work, under a duty to others to see that it is carefully performed. It cannot be better stated than in the language used by Cockburn, C.J., in *Bower* v. *Peate,* 1 Q.B. Div. 321, 326, a leading and well-considered case. It is, 'that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be averted, is bound to see the doing of that which is necessary to prevent mischief, and cannot relieve himself of his responsibility by employing some one else -- whether it be the contractor employed to do the work from which the danger arises, or some independent person -- or to do what is necessary to prevent the act he has ordered done from becoming unlawful.' It was suggested by Lord Blackburn in *Hughes* v. *Percival,* 8 App. Cas. 443, that this was probably too broadly stated. But in the recent case of *Hardaker* v. *Idle District Council* (1896), 1 Q.B. 347, the doubt expressed by Lord Blackburn was regarded as unwarranted, and the principle as formulated by Cockburn was adopted and applied. This does not abrogate the law as to independent contractor. It still leaves abundant room for its proper application. 'There is,' as stated by Cockburn, 'an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless precautionary measures are adopted.' "The weight of reason and authority is to the effect that, where a party is under a duty to the public, or third person, to see that work he is about to do, or have done, is carefully performed, so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another." *Covington, etc., Bridge Co.* v. *Steinbrock & Patrick,* 61 Ohio St. 215 (55 N.E. 618, 76 Am. St. Rep. 375), and cases cited. The principle involved cannot be better stated than it is in the sentence last quoted, *supra.* It is not applied to those cases where the injuries occur which are collateral to the employment, like the dropping of material by the servant of a contractor upon a person passing by, but where a duty is imposed upon the employer in doing work necessarily involving danger to others, unless great care is used, to make such provision against negligence as may be commensurate with the obvious danger. It is this duty which cannot be delegated to another so as to avoid liability for its neglect. The facts in the instant case bring it squarely within the rule contended for by plaintiff, supported by the great weight of the authorities. There was a condition of great danger caused by an unprecedented drought, apparent to every one, cautions and warnings had been given, yet no precautions were required or enforced, in fact, defendants acted in permitting these fires to be set with utter disregard of consequences, which, under the conditions, naturally resulted from such conduct. [*Inglis,* 169 Mich at 319-322.]

Inglis indicates that the liability of an employer for damages caused by the actions of an independent contractor, arises from the inherent dangers of the activity being conducted. The paramount inquiry is to the nature of activity being conducted and the inherent potential for harm arising from the activity. Further, the duty that existed was to make certain that the activity was conducted safely so as not to injure others. The duty was non-delegable. The doctrine as such was applied in subsequent cases.

B. **Modern statement of the inherently dangerous activity doctrine in Michigan**

This Court in *Bosak v Hutchinson, supra,* 422 Mich 727-728, succinctly summarized the basic elements of the inherently dangerous activity doctrine. The Court stated:

> Having examined these various definitions of what constitutes an inherently dangerous activity, it is apparent that an employer is liable for harm resulting from work "necessarily involving danger to others, unless great care is used" to prevent injury, *Inglis*, *supra*, 169 Mich. at 331, 136 N.W. 443, or where the work involves a "peculiar risk" or "special" or "reasonable" precautions. 2 Restatement Torts, 2d, Secs. 416-427. It must be emphasized, however, that the risk or danger must be "recognizable in advance," i.e., at the time the contract is made, for the doctrine to be invoked. Thus, liability should not be imposed where a risk is created in the performance of the work which was not reasonably contemplated at the time of the contract. [FN citation omitted.]

Two sections of the Restatement of Torts, as noted in *Bosak, supra,* assist in formulating the definition of an inherently dangerous activity. Section 416 of the Restatement states:

> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take precautions, even though the employer has provided for such precautions in the contract or otherwise. [2 Restatement Torts, 2d.]

Section 427 of the Restatement states:

> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger. [2 Restatement of Torts, 2d.]

Further, Comments (b), (c), and (d) to § 427 flesh out and define the inherently dangerous activity doctrine. They state in part:

> b. The rule stated in this Section is commonly expressed by the courts in terms of liability of the employer for negligence of the contractor in doing work which is "inherently" or "intrinsically" dangerous. It is not, however, necessary to the employer's liability that the work be of a kind which cannot be done without a risk of harm to others, or that it be of a kind which involves a high degree of risk of such harm, or that the risk be one of very serious harm, such as death or serious bodily injury. It is not necessary that the work call for any special skill or care in doing it. It is sufficient that work of any kind involves a risk, recognizable in advance, of physical harm to others which is inherent in the work itself, or normally to be expected in the ordinary course of the usual or prescribed way of doing it, or that the employer has special reason to contemplate such a risk under the particular circumstances under which the work is to be done.
>
> c. The rule applies equally to work which, although not highly dangerous, involves a risk recognizable in advance that danger inherent in the work itself, or in the ordinary or prescribed way of doing it, may cause harm to others.
>
> d. As in the case of the rule stated in Sec. 416, the rule here stated applies only where the harm results from the negligence of the contractor in failing to take precautions against the danger involved in the work itself, which the employer should contemplate at the time of his contract. It has no application where the negligence of the contractor creates a new risk, not inherent in the work itself or in the ordinary or prescribed way of doing it, and not reasonably to be contemplated by the employer.

A review of the Restatement language, comments, and *Bosak, supra,* indicate the general factors and considerations in determining whether an activity is an inherently dangerous activity. They can be summarized, although not exhaustively, as follows:

- activity involves a danger to others
- peculiar or special risk inherent in the activity itself
- activity does not have to require special skill
- activity does not have to be highly dangerous or the kind that cannot be done without danger
- activity requires contractor to take special precautions to prevent injury
- liability attaches when the contractor fails to take those precautions
- contractor's negligence cannot create a new or collateral risk not inherent in activity
- employer knows or should know, at the time of the contract, the dangers inherent in the activity (also stated as "recognizable in advance").

C. Michigan's case law recognizes that the inherently dangerous activity doctrine can apply to employees of independent contractors

In *Vanoy v City of Warren,* 15 Mich App 158, 166 NW2d 486 (1968), the Michigan Court of Appeals concluded that an employee of an independent contractor engaged in an inherently dangerous activity could recover under the doctrine. *Vannoy* involved an action against the city for the death of an excavating company's employee. The court stated, "Whether the performance of decedent's task was inherently dangerous was a question of fact which the trial judge properly submitted to the jury. It is ludicrous to intimate that working in an atmosphere of deadly, tasteless, odorless and colorless gas without any protective devices is not a dangerous activity." *Id.* at 164. The court rejected the City's arguments that the employee of the independent contractor could not recover under the doctrine. The court stated:

> A distinction, as argued by the city, based upon the legal designation of injured parties, *e.g.* "third" persons or "others" as opposed to employees of independent contractors, violates the absolute character of the duty and is contrary to the Court's rationale set forth in *Olah* v. *Katz, supra; Watkins* v. *Gabriel Steel Co.* (1932), 260 Mich 692; *Utley* v. *Taylor & Gaskin, Inc.* (1943), 305 Mich 561 and *McCord* v. *United States Gypsum Co.* (1966), 5 Mich App 126, 145 NW2d 841. [*Vannoy,* 15 Mich App at 164.]

The court in *Vannoy* focused the inquiry on the nature of the dangerous activity. Therefore, the status of the injured party as an employee of the independent contractor did not impact the ability to recover under the doctrine.

In *McDonough v General Motors Corp,* 388 Mich 430; 201 NW2d 609 (1972), this Court again addressed the issue, *inter alia,* of whether an employee of an independent contractor could recover under this theory against General Motors. *McDonough* is an important case because it delineates, albeit not cohesively, the fundamental arguments for and against whether an employee of independent contractor engaged in an inherently dangerous activity should be able to sue the property owner.

In *McDonough*, a contractor's employee, a journeyman iron worker, was killed when attempting to secure the boom of a derrick to a permanent truss. This Court concluded in a *per curiam* opinion that, with the facts that were adduced, the issue of whether the activity was inherently dangerous should have gone to the jury. *Id.* at 439, 441. The result, although not expressly stated, was to allow the employee of an independent contractor to recover under the inherently dangerous activity doctrine.

Whether General Motors retained control of the worksite and activities was not dispositive of the inherently dangerous activity doctrine. Key was the level of danger in the activity to others and the level of care that was employed. *Id.* at 439. This Court noted that a property owner has a non-delegable duty that cannot be avoided by contract. *Id.* at 441-442. The *per curiam* opinion did address retained control as a theory of recovery by analyzing the contracts and what control General Motors retained over the project. *Id.* at 442-445. The *per*

curiam opinion compared the retained control theory of recovery to the case of *Lake Superior Iron Co v Erikson,* 39 Mich 492 (1878).

In *McDonough,* Chief Justice Kavanagh concurred in part and dissented in part. Justice Kavanagh stated:

> But, it violates logic and established law to conclude that the independent contractor's employee - - who after all derives no personal economic benefit, other than that of any ordinary employee, from the contractual relationship between the landowner and his employer - - is relegated to a class outside the protection of negligence law or that the rule of liability is so restrictive as to only 'protect innocent third parties.' To capsulize *Clark v. Dalman, supra,* the rule protects everyone lawfully on the site of the project. Thus, where evidence is adduced demonstrating that work to be done involves 'special danger' or is 'inherently dangerous,' the rule advanced in Per Curiam opinion and its supporting authorities, E.g., 2 Restatement, Torts 2nd, § 427, is fully applicable. [*McDonough,* 388 Mich at 448-449.]

Justice Kavanagh also noted the possibility of other theories of recovery such as dangers on the premises outside of the work being completed. *Id.* at 450-451. Justice Kavanagh also joined the dissent of Justice Brennan.

Justice Brennan's dissent was in fundamental disagreement with the *per curiam* opinion and believed the doctrine "is designed to protect innocent third parties injured by the execution of an inherently dangerous undertaking. The rule is not designed, nor was it ever intended to benefit the contractor who undertakes the dangerous work, or his employees." *McDonough,* 388 Mich at 455-456. The dissent sets forth cases in which the injured party was not engaged in the inherently dangerous activity. *Id.* at 452. It noted the limited number of cases that involved an injury to a plaintiff that was himself engaged in the inherently dangerous activity. It further noted that cases where employees recovered were based on *other* grounds. *Id.* at 453-455. The gravamen of Justice Brennan's dissent is that the contractor and his employees are hired for purposes of their expertise, and liability should not be passed on to the property owner who might not possess comparable expertise.

Funk v Gen Motors Corp, 392 Mich 91; 220 NW2d 641 (1974) *overruled* in part on other grounds, *Hardy v Monsanto Enviro-Chem Systems, Inc,* 414 Mich 29; 323 NW2d 270 (1980), involved an action by a subcontractor's employee against the general contractor and the site owner, General Motors. This Court reversed a jury verdict against General Motors because a majority found that the trial court had erroneously instructed the jury on the inherently dangerous activity doctrine. This Court specifically concluded that the doctrine was inapplicable in that case and stated:

> The judge instructed the jury that General Motors would be liable if the work assigned Funk was "inherently, or intrinsically dangerous". She defined "inherently" as "belonging to the very nature of the thing", "intrinsically" as "arising from the true or fundamental nature of a thing". The risks inherent in large-scale construction work justify imposing responsibility on a responsible person to take appropriate precautions. However, as the authorities cited by the parties illustrate, it is difficult to generalize as to which party or entity should bear this responsibility. In some instances, as to some risks, at [sic] will appear unwarranted to impose the responsibility on anyone other than the immediate employer of the workman, whether he be a subcontractor or general contractor. In other circumstances, as here, it will appear, by reason of additional factors, that responsibility should be imposed on the general contractor. In still others, nothing short of imposition of complete enterprise responsibility on the owner will be consistent with the developing policies of the law of torts. [fn omitted] This was not an unusual construction job. The risk -- slip and fall -- was not unique. Reasonable safeguards against injury could readily have been provided by taking well-recognized safety measures. The owner appears to have selected a responsible, experienced contractor. [fn omitted] We are not persuaded that the imposition of enterprise responsibility on this owner, *qua* owner, is justified and, therefore, order a new trial as to General Motors because, although the jury could have properly returned a verdict against General Motors on the basis of its exercise of retained control, the jury may have found against General Motors *as owner* on the alternative theory of liability which should not have been submitted. [*Funk,* 392 Mich 109-111.]

The above-quoted portion from *Funk* does not indicate that the inherently dangerous activity doctrine cannot apply to employees of contractors engaged in an inherently dangerous activity. Appellant mischaracterizes and overextends *Funk's* conclusions in

stating, "The Court's opinion in *Funk*, certainly affirmed the historical principles that liability for injuries to an independent contractor's employees was dependent upon 'additional factors,' i.e. retained control of defective premises or scope of work, rather than simply the nature of the work to be performed." [Appellants' brief, p 23.] The "circumstances" and "additional factors" referenced in the above-quoted portion from *Funk,* refers to the retained control theory - a separate theory the Court recognized could apply. The more prudent inquiry not addressed by Appellants is whether the inherently dangerous activity doctrine should offer employees of independent contractors a theory for recovery.

In *Warren v McLouth Steel Corp,* 111 Mich App 496; 314 NW2d 666 (1981), the Michigan Court of Appeals concluded that the trial court did not err in denying McLouth's motion for directed verdict on the issue of inherently dangerous activity. In *McLouth*, a contractor's employee was injured when he fell from a steel beam. *Id.* at 499- 500. The court relied upon *Dowell v General Telephone Co of America,* 85 Mich App 84; 270 NW2d 711 (1978) (Court of Appeals affirmed trial court's judgment in that the injured plaintiff, employed as a lineman and who fell while climbing a telephone pole, had presented sufficient proof as to his claims - one of which was the inherently dangerous activity doctrine).

In *Bosak v Hutchinson, supra*, this Court noted that it had been recognized in Michigan case law that an employee of an independent contractor can recover under the inherently dangerous activity doctrine citing to *McDonough* and *Vannoy, supra. Bosak* involved, in pertinent part, a claim by an employee of a subcontractor injured while a crane was being assembled. *Id.* at 717. This Court concluded the Court of Appeals erred in reversing the trial court's grant of directed verdict in favor of the general contractor on the inherently dangerous activity doctrine. This Court reasoned that assembling of the crane was a normal activity that did not create a peculiar or special danger. *Id.* at 730.

In *Muscat v Khalil,* 150 Mich App 114; 388 NW2d 267 (1986), the Court of Appeals noted the distinction between an employee of an independent contractor and the contractor

himself attempting to use the inherently dangerous activity doctrine. The court affirmed the trial court's grant of summary judgment as to the independent contractor's claims under the inherently dangerous activity doctrine. The court's rationale is instructive. The court stated:

> We note from each of the passages quoted above that the independent contractor himself is not mentioned as a party intended to benefit from the inherently dangerous activity doctrine. Rather, the passages refer to "third parties" or, more generally, "others", and employees of the contractor. We do not believe that these references were inadvertent since none of the cases cited by the plaintiff involves a recovery by the independent contractor himself for damages sustained as a result of his own negligence in performing the work of the employer. We believe that an important distinction exists between employees of an independent contractor and the independent contractor himself. **Since an employee has no control over the manner in which the work is to be performed and must simply carry out the orders and directions of his employer, he stands in a position more closely akin to the innocent bystander, or "third party".** The independent contractor himself, on the other hand, was hired specifically for his ability to perform the work properly and is given complete control over the manner in which the job is to be completed. **Thus, where harm occurs as a result of the failure to take "special" precautions in work "'necessarily involving danger to others, unless great care is used'", *Bosak, supra*, p 727, quoting *Inglis v Millersburg Driving Ass'n, supra*, p 331, employees and third parties, not having the authority to ensure that the necessary care is used, are rightfully excepted from the general rule which immunizes the employer of the independent contractor from liability.** However, the independent contractor himself in most instances is in a better position to determine when and where "great care" and "special precautions" are warranted and is empowered with the authority to ensure that such care is exercised. [n. omitted]. Therefore, without considering whether the activity involved herein was in fact "inherently dangerous", we conclude that the position advanced by plaintiff would result in an unwarranted extension of the "inherently dangerous activity" exception to the immunity afforded employers of independent contractors. [*Muscat,* 150 Mich App 119. (Emphasis added.)]

Muscat and *Vannoy, supra,* provide a cogent rationale from case law for why employees of an independent contractor engaged in an inherently dangerous activity should be allowed to recover under the doctrine and stand in juxtaposition to Justice Brennan's dissent in *McDonough, supra.* However, Justice Brennan's analysis was in a dissent and has not been adopted by this Court.

Burger v Midland Cogeneration Venture, 202 Mich App 310; 507 NW2d 827 (1993), involved a subcontractor's employee who brought suit against a plant owner and the general contractor based on a slip and fall. The subcontractor was engaged in installing boilers. The employee was standing on a wet pipe in an air duct and slipped and fell. *Id.* at 311. Cross appeals were filed in the Court of Appeals. The Court of Appeals rejected the defendants' arguments that they were statutory employees, pursuant to MCL 418.171, entitled to the exclusive remedy provision of MCL 418.131 and reversed the trial court's grant of summary disposition. *Burger,* 202 Mich App at 312-315. The court affirmed the trial court's denial of the defendants' motion for summary disposition because when evidence is presented on the activity, the determination of whether an activity is an inherently dangerous activity is a question for the jury. *Id* at 316. *Burger* recognized that whether an activity is an inherently dangerous activity is a jury question. Further, it recognized that an employee of an independent contractor could recover under the inherently dangerous activity doctrine.

Cases in Michigan have clearly held that employees of independent contractors who are engaged in an inherently dangerous activity can recover against the property owner. The best summaries of the arguments for current state of the law appear in *Vannoy* and *Muscat, supra.*

D. **Appellants fail to identify perpetuated error in existing case law or public policy reasons for concluding employees of independent contractors should not be covered under the inherently dangerous activity doctrine; however, there is reason to conclude that the doctrine should apply only to those not covered under workers' compensation insurance**

Appellants' argument on whether the doctrine has been extended too far misses the mark. It fails to recognize this Court's need to not miss the forest for the trees. A change in the law by this Court reaches beyond the parties of this appeal and changes the legal landscape of this state.

Appellants offer no arguments or applicable case law as to why the state of the law in Michigan regarding employees of independent contractors being able to recover under the inherently dangerous activity doctrine should change or how the body of case law has been perpetuated in error. They offer no public policy reason to change the state of the law. Appellants have argued [notwithstanding the cases that clearly articulate otherwise] that employees of independent contractors have been allowed to recover under different theories, i.e., retained control or unsafe common workplace based on some other duty owed from the property owner to the employee of the independent contractor.[4] MDCH does not dispute the body of case law cited by Appellants on these and any other theories. The ability of employees of an independent contractor to recover under these distinct theories arising from separate duties is not in dispute or at issue. Appellants cite to no cases that recognized these other theories as the only ones available and disavowed the inherently dangerous activity doctrine as it relates to employees of independent contractors.

Following this Court's prior decisions under the prudential doctrine of *stare decisis* is preferred "'because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Robinson v Detroit,* 462 Mich 439, 463; 613 N.W.2d 307 (2000), quoting *Hohn v United States,* 524 U.S. 236, 251; 118 S. Ct. 1969; 141 L. Ed. 2d 242 (1998). It is also recognized that "*stare decisis* is a 'principle of policy' rather than 'an inexorable command,' [fn omitted] and that the Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned. [fn omitted]"

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[4] The Appellants' argument is flawed and without logical reason. An illustration captures Appellants' argument and indicates the logical flaw. *On Monday a tailor accepts cash and checks as the forms of customer payment but never before considered credit cards. On Tuesday he decides to accept cash, checks, and credit cards because, although they are all different and credit cards are more recent, they still compensate him. On Wednesday the tailor does not reject credit cards solely because on Monday he accepted only cash and checks; to do so based on this alone would be without logical reason.*

Robinson, 462 Mich at 464. However, Appellant has offered no reason for why the decisions are unworkable or wrongly decided.

Although Appellants fail to set forth reasoning for a change in Michigan's law, MDCH submits that any change based on the jurisprudence of sister states, should be limited to a narrow exception. Sister states' jurisprudence seems not to allow recovery under the doctrine if an employee of an independent contractor is covered by workers' compensation insurance. However, DeShambo would be an example of an employee not covered by workers' compensation and who should be able to recover under the doctrine. (Appellants' Appendix I, p 66a; Appendix K, p 123a.)

An analysis of a well-developed body of case law from sister states seems to hold that the majority of states do not apply the inherently dangerous activity doctrine to employees of independent contractors. But, the overarching reasoning for such decisions is *not* that the doctrine as been overextended from its origins but rather the independent contractor's employee has the *availability of workers' compensation benefits.*[5] Such cases *left open* the issue of those employees not covered under workers' compensation; however, the inverse of the argument would seem to hold true.

In *Privette v Superior Court,* 5 Cal 4th 689; 854 P2d 721 (1993)[6], an injured contractor's employee was found not able to recover against the property owner vicariously under the doctrine. The Supreme Court of California overruled a line of cases that has held an employee of an independent contractor could recover under the doctrine. *Id.* at 702. The California Supreme Court had a number of reasons for its decision. California recognized

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[5] It must be stated that an all-encompassing review and analysis of the forty-nine other states' workers' compensation laws would render an analysis too cumbersome and lengthy but on balance the reasoning is consistent. MDCH has chosen three often-cited cases from the states of California, North Dakota, and Missouri. However, the issue of employees not covered under workers' compensation was not addressed in these cases or in any others that could be located.

[6] *Privette* and later California cases are discussed in Turner, *Toland v Sunland Housing Group, Inc., The California Supreme Court Erroneously Takes "Liability" Out of "Direct Liability,"* 27 W St UL Rev 425 (1999/2000).

the principle that persons held liable under the "peculiar risk doctrine" could generally seek indemnification from negligent parties, but the exclusive remedy provisions of the workers' compensation laws would shield a negligent contractor from such an action. This would be against general tort principles of holding the one causing the injury ultimately responsible. *Id.* at 700-701. It noted, however, that *all* workers under California's workers' compensation laws had a form of recovery, regardless of fault, which advanced the same policy concerns as the "peculiar risk doctrine;" assuring compensation for injury, spreading the risk to those who benefit from the work by including the cost of workers' compensation insurance in the price for the contracted work, and encouraging industrial safety. Id. at 697-701. The Court noted an anomalous result would occur if an employee covered by workers' compensation and who was injured by his independent contractor employer could recover against the property owner in tort but not against his employer. *Id.* at 698-699. Further, the California Supreme Court recognized that if the "peculiar risk doctrine" applied to contract employees engaged in inherently dangerous activities, they could receive windfalls by being exempt from workers' compensation limits. *Id.* at 699-700.

In *Fleck v ANG Coal Gasifications Co,* 522 NW2d 445 (N.D.,1994)[7], the Supreme Court of North Dakota declined to allow an injured contractor's employee to recover against the company vicariously under the doctrine. The Court cited and quoted *Privette, supra,* and similar case law from other jurisdictions and noted that the primary purpose of §§ 416 and 427 of the Restatement was to ensure that an injured party was not left without a remedy.[8] *Id.* at 450-451. The Court noted that holding a property owner liable for the injury to the

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[7] An analysis of *Fleck* is discussed in Richard, *Liability for Injuries to Third Parties: Employers' Vicarious Liability to Employees of an Independent Contractor Fleck v ANG Coal Gasification Co.*, 522 NW2d 445 (N.D. 1994) at 72 N Dak L Rev 181 (1996).

[8] The court in *Fleck* cited a fairly comprehensive list of case law from a number of states. It noted the majority of states do not allow employees of independent contractors to recover under the doctrine through vicarious liability. It also cited cases from the minority position that recognize that employees can recover. *Id.* at 450-451. The cases in the minority cited do not address similar workers' compensation arguments; therefore, are not useful to that analysis.

contractor's employee could cause the property owner to use his own inexperienced employees to conduct the activity because they would be covered by workers' compensation. *Id.* at 452. Members of the public are normally exposed to dangers by coincidence and are less able to protect themselves than employees. Also, allowing employees covered under workers' compensation to recover, would create a class of workers who could recover in tort outside the workers' compensation limits. *Id.* at 453. Finally, the North Dakota's workers' compensation laws operate as a statutory "release" between the contractor and his employee; therefore, vicarious liability cannot flow to the property owner. *Id.* at 453-454.

In *Zueck v Oppenheimer Gateway Properties, Inc,* 809 SW2d 384 (Mo., 1991)[9], the Missouri Supreme Court overruled existing precedent and concluded that workers of independent contractors cannot recover under the doctrine when covered by workers' compensation benefits. The Court recognized that expertise usually rests with the independent contractor who conducts the manner in which it is done. Allowing employees of an independent contractor to recover rewards the property owner who proceeds with his own employees who might not be skilled in the activity, because the employees of the property owner will be covered under workers' compensation. This places the employee and innocent bystanders at risk. The burden should rest on the party best able to prevent its harm. *Id.* at 387-388. Expenditures of workers' compensation premiums are passed on in the contract

[9] *Zueck* and similar Missouri case law are discussed in Clement, *Missouri Slams the Door on Employees of Independent Contractors*, 59 Mo L Rev 1037 (1994). *Zueck* was specifically cited to and approved by the Missouri Supreme Court in *Matteuzzi v The Columbus Partnership, LP,* 866 SW2d 128 (Mo.,1993). *Matteuzzi* reaffirmed the reasoning of *Zueck* and applied it to a claim brought pursuant to 2 Restatement of Torts 2nd, § 413 involving the duty to provide for taking precautions against dangers involved in work entrusted to contractor. It also noted, in *dicta,* that property owner vicarious liability under the inherently dangerous activity doctrine still existed as to those "third parties" not covered by workers' compensation; however, it did not affirmatively define whether a "third party" could include an employee not covered by workers' compensation.

price and the property owner should not then face tort liability as well. *Id.* at 389-390.[10] "The conceptual bases of workers' compensation programs and vicarious liability therefore appear to be identical: compensation of the injured party at the expense of the party in the best position to distribute the loss." *Id.* at 389, quoting Henderson, *Liability to Employees of Independent Contractors Engaged in Inherently Dangerous Work: A Workable Workers' Compensation Proposal*, 48 Fordham L Rev 1165, 1185 (1980). The state of the law in Missouri had changed in that workers' compensation laws did not allow the negligence of the injured worker as a defense against the property owner's liability. *Id.* at 389. Allowing an employee of an independent contractor who can avail himself of workers' compensation benefits creates a limited class of employees who can recover outside of workers' compensation and who can bargain for higher compensation. *Id.* at 390.

MDCH asserts that the general rationale of these cases is persuasive on the issue of employees covered by workers' compensation.[11] Where the employee is not covered by workers' compensation, the doctrine should be available because the inverse of the logic employed in *Privette, Fleck and Zueck, supra,* calls for the result. The employee outside of workers' compensation has no guaranteed statutorily bargained for recovery. The contractor has

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[10] The impact of workers' compensation on recovery under the doctrine was also recognized in 2 Restatement of Torts 2nd, Special Note to Ch. 15 (Tentative Draft No. 7, 1962). The draft was cited in *Privette, Fleck, and Zueck, supra.* (Intervenor-Appellee's Appendix B.) The draft was not included in the Restatement notes due to the diverse nature of the states' workers' compensation laws.

[11] It should be noted that *Privette, Fleck, and Zueck, supra,* all recognize that a property owner's liability is vicarious. *Oberle v Hawthorne Metal Prods,* 192 Mich App 265, 270-271; 480 NW2d 330 (1991), appears to hold otherwise in Michigan. *Oberle* held that common-law indemnity was not available where the primary complaint alleges liability under the inherently dangerous activity doctrine because the claim alleges active negligence on the part of the property owner. The *Oberle* court agreed with the court's earlier decision in *Witucke v Presque Isle Bank,* 68 Mich App 599; 243 NW2d 914 (1976). This court denied an application for leave to appeal on *Oberle* and declined to address whether liability for the inherently dangerous activity is active or passive. *Oberle v Hawthorne Metal Prods*, 440 Mich 882; 487 NW2d 425 (1992).

not passed on the costs of workers' compensation to the property owner. There is no special class of employee who can recover under both tort and workers' compensation. If anything, such a holding would place the employee who is outside of workers' compensation in a more equal position with those who are. The employee outside of workers' compensation does not have guaranteed recovery and the insolvency of his employer could yield him nothing to compensate his injury. In the current appeal, Anderson was not an "employer" subject to the workers' compensation laws pursuant to MCL 418.115. (Appellants' Appendix I, p 66a; Appendix K, p 123a.) DeShambo cannot recover workers' compensation benefits.

II. Sufficient evidence was presented to make the question of whether the timbering operation in this case was inherently dangerous one for the jury, and the Nielsens' allegations of collateral negligence and safety measures are insufficient to remove the question from the jury

Two questions have reoccurred in Michigan case law regarding the inherently dangerous activity doctrine. First, cases often address whether the risk was inherent in the activity itself or was a new or collateral risk. Second, cases have addressed the aspect of safety measures and procedures.

Michigan case law has provided a spectrum of cases in which a determination was made of whether the risks in an activity were inherent in the activity or collateral. *See Kulp v Verndale Products Inc,* 193 Mich App 524, 531; 484 NW2d 699 (1992) (subcontractor's employee was not engaged in an inherently dangerous activity when the roof joists collapsed injuring him because there was nothing inherently dangerous in the work but rather the joists were improperly set). *Bosak,* 422 Mich at 730 (assembly of a crane was not an inherently dangerous activity). *Phillips v Mazda Motor Mfg,* 204 Mich App 401, 406-407; 516 NW2d 502 (1994) (proper question of fact for jury to determine whether the "[d]ecendent's job as a connector requir[ing]

him to connect trusses sixty feet in length and seven tons in weight while standing on top of columns thirty-seven feet high" was inherently dangerous).

The determination of whether an activity is inherently dangerous necessitates a fact-intensive review for each case and each activity involved. The review requires inquiry into the nature of the risks and the level of recognition of those risks by the individual against whom the doctrine is being applied. Precedent holds that "[w]here evidence is presented concerning the hazardous elements of a job, the determination whether the job is inherently dangerous is a question for the jury." *Burger v Midland Cogeneration Venture, supra. See also Perry v McLouth Steel Corp,* 154 Mich App 284, 301; 397 NW2d 284 (1986); *Warren v McLouth Steel Corp, supra*; *Phillips v Mazda Motor Mfg*; *supra*; *Kubisz v Cadillac Cage Textron Inc,* 236 Mich App 629; 601 NW2d 160 (1999).

The Court of Appeals properly rejected the circuit court's reliance on "fairly routine task" or "unusual" language used by the circuit court. (Appellants' Appendix F, p 27a) At the onset of legal argument for the Nielsons' Motion for Summary Disposition, the circuit court misapplied the general factors of the inherently dangerous activity doctrine. The circuit court framed the foremost question it believed was at issue in this case as "whether cutting timber ought to be deemed an extraordinarily hazardous activity subject to this special liability." (Appellants' Appendix I, pp 68a –69a.) The Restatement language, Comments, and *Bosak, supra*, cited in the prior subsection of this brief indicate that the activity does not have to be "highly" or, as the circuit court characterized, "extraordinarily" hazardous to qualify under the inherently dangerous activity doctrine. The circuit court erred in construing the general factors of the doctrine to require "extraordinary" danger. The Court of Appeals properly pointed that out, albeit not dispositive to the appeal.

The circuit court repeatedly stated that the inherently dangerous doctrine should not apply to routine activities. In referring generally to cutting timber and certain cases involving the doctrine the court stated, "so it is kind of a routine thing, and that kind of distressed me that some of these cases do make routine actions into extraordinarily nearly hazardous activities. . . ." (Appellants' Appendix I, p 69a.) The circuit court's misapplication of the doctrine appears early on in the January 8, 2001, hearing. The circuit court stated that the inherently dangerous activity doctrine "should be limited to extraordinarily unusual types of activities. . . ." (Appellants' Appendix I, p 69a.) On this issue the circuit court more fully stated:

> I recognize there are many cases, I don't know if there are many but there are some anyway, in which that doctrine has been applied to, what appear to be fairly routine kinds of situations; an example would be *Kubisz v. Cadillac Cage Textron*, 236 Mich App 629, a 1999 case. And, that case involves doing some welding modifications to a fuel tank on a vehicle, and it exploded. And, you know, welding metal to make modifications on a vehicle doesn't sound like that's all that unusual, but that's the way they held it, and that is a published decision.
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> There's also another example, would be *Burger v. Midland Cogeneration Venture*, 202 Mich App 310, a 1993 case; and, in that a worker for one of the contractors was standing on a wet pipe inside an air duct for the purpose of cleaning the duct when he slipped and fell and injured himself permanently. Now, I mean, I have to believe that in construction projects that standing on, you know, one piece of metal to work on another piece of metal, I mean what's unusual about that; and, yet, the Court of Appeals found that's inherently dangerous activity. Well, by that standard any human activity that involves leaving your home is inherently dangerous because something bad can happen to you. And, you know, the delivery man who makes deliveries, if you have somebody deliver your package for you, inevitably there's going to be a crash here or there and the delivery man is going to be injured, that happens once in awhile and that doesn't make it inherently dangerous activity; it is common, not unusual and inherently dangerous. **So, I just, I think that line of cases is wrong; but it is published obviously, so we'll leave it at that**. [Appellants' Appendix I, pp 83a – 84a. (Emphasis added.)]

The circuit court based its conclusion that there is an "unusual" nature requirement to the inherently dangerous activity doctrine on the case of *Rasmussen v Louisville Ladder, Co*, 211 Mich App 541; 536 NW2d 221 (1995). The circuit court discussed *Rasmussen* stating:

> However, we do have other cases which do seem to say that being unusual is part of the requirement. I cite, *Rasmussen versus Louisville Ladder*, 211 Mich App 541, 1995. And in that case - - okay, this was a construction of a building, and the plaintiff was working standing on scaffolding was - - that had been erected as part of the construction of a multi-story building and the scaffolding collapsed. And, the Court of Appeals ruled that is not, you know, working on scaffolding and having scaffolding on a building being built, is not inherently dangerous activity. And it says, on Page 549 of the Court of Appeals opinion, "Similarly, liability should not be imposed where the activity involved was not unusual, the risk was not unique, 'reasonable safeguards against injury could readily have provided - - could readily have been provided by well-recognized safety measures,' and the employer selected a responsible [language omitted]."; citing authority.
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> And, you know, working on scaffolding, you know, obviously it's up in the air and you are afraid of it falling down and you falling over, but it's not unusual, it's standard procedure in a multi-story building. And cutting wood is not unusual, it's standard procedure when you got a wood lot, it's what everybody does and should do, that's a policy thing we want people to do; and, obviously, the risk could be avoided by keeping people clear when the tree is falling. So it seems to me that *Rasmussen* is better law in this case.

In *Rasmussen*, scaffolding collapsed when hemp ropes were used to secure the scaffolding instead of steel safety cables. The court in *Rasmussen* concluded that the dangerous activity was not the activity of using hanging scaffolding but rather the use of hemp ropes. *Rasmussen*, 211 Mich App at 549. In reaching its conclusion the court stated:

> The activity recognized by defendant Lake Shore to be performed by plaintiffs involved the fairly routine task of constructing a multistory building using hanging scaffolding. Reasonable safeguards against injury were expected to be used. [*Id.* (Citation omitted.)]

A similar Court of Appeals opinion appears in *Szymanski v K Mart Corp*, 196 Mich App 427; 493 NW2d 460 (1992) (vacated and remanded on other grounds 442 Mich 912; 503 NW2d 460 (1993); on remand 202 Mich App 348; 509 NW2d 801 (1993)). In *Szymanski* the activity involved washing windows on a scaffolding suspended from the side of a building forty feet above the ground. The plaintiff fell from the scaffold. The matter went to trial before a jury, and the lower court denied defendant's motion for directed verdict and concluded, in part, that

window washing was inherently dangerous. On appeal, the court in *Szymanski* concluded that inherently dangerous activity doctrine did not apply because "any danger of serious physical injury from this activity could have been prevented by the use of well-recognized safety measures, i.e., safety belts and safety lines." *Id.* at 432. Further, the court concluded, "The risk of injury was not inherent to the work being done, but was created by the failure to use well-recognized safety measures." *Id.* The court noted:

> [L]iability should not be imposed where the activity involved was not unusual, the risk was not unique, "reasonable safeguards against injury could readily have been provided by well-recognized safety measures," and the employer selected a responsible, experienced contractor. [*Szymanski*, 196 Mich App at 429. (Quoting, *Funk*, 392 Mich at 110.)]

In *Rasmussen* and *Szymanski*, the courts' inquiries into whether the activity leading to injury was "unusual" and the existence of "reasonable safeguards" was drawn from *Funk,* 392 Mich at 110. This Court concluded that liability should not be imposed when "reasonable safeguards against injury could readily have been provided by well-recognized safety measures." *Id.* "Reasonable safeguards" language is an attempt to establish whether the risk is collateral or a new risk and not inherent in the activity, as best expressed in *Bosak, supra* at 728.

The existence of safety procedures does not act as a bar as a matter of law to an action alleging the application of the inherently dangerous activity doctrine. Their existence should not be overstated. It is *paradoxical* to assume that the existence of safety procedures, even if not followed, necessarily bars recovery. If an activity is inherently dangerous, it is likely to have safety procedures. This Court recognized that "where the work involves a 'peculiar risk' or 'special danger' which calls for 'special' or 'reasonable' precautions" that is indicative of an inherently dangerous activity. *Bosak*, 422 Mich at 728 (citing 2 Restatement of Torts, 2d, Secs. 416, 427). Further, §§ 416 and 427 of the Restatement of Torts, *supra,* indicate that liability

attaches when the contractor fails to follow the safety precautions. Failure to follow these procedures does not make the activity outside the scope of being inherently dangerous. Very much to the contrary, failure to follow safety precautions can bring the activity within the doctrine. Only if the failure to follow the safety procedures creates a new risk will the activity be outside the doctrine. *Bosak*, 422 Mich at 730. As the Offer of Proof made by DeShambo indicates, the felling of timber even with all of its safety procedures is inherently dangerous. Being struck by a falling tree is an ever-present indisputable reality of the activity. (Intervenor-Appellee's Appendix A.)

The Missouri Court of Appeals was confronted with the misconception regarding the effect of the existence of safety procedures in Missouri case law as is argued by the Nielsons. In *Hatch v V.P. Fair Foundation*, 990 SW2d 126 (Mo.,1999) the Missouri Court of Appeals rejected the *dicta* expressed in *Reed v Ocello*, 859 SW2d 242 (Mo., 1993) (tree trimming case where independent contractor was injured by falling branch that was supposed to be lowered to the ground by several individuals from 70 feet in the air). In *Reed* the prior decision stated, "Thus, if there is a safe way to perform the activity, it is not inherently dangerous, and the general rule of landowner non-liability applies." *Id.* at 245. In rejecting *Reed's* improper characterization of the effect of safety procedures in ascertaining whether an activity is inherently dangerous but accepting that the activity was not inherently dangerous, a subsequent court stated, "[t]he essence of inherent danger . . . is the need for special precaution. It is not sufficient for the defendant to show that the work can be done safely." *Hatch*, 990 SW2d at 135 (Mo., 1999) (quoting *Ballinger v Gascosage Electric Cooperative*, 788 SW2d 506 (Mo. en banc 1990) *overruled* in part on other grounds, *Zueck, supra*).

The Supreme Court of Montana was confronted with the misconception regarding the effect of the existence of safety procedures in Montana case law as is argued by the Nielsons. In *Beckman v Butte-Silver Bow County,* 299 Mont 389; 1 P3d 348 (2000), the plaintiff working for a contractor attempted to sue the county employing the contractor under the inherently dangerous activity doctrine and retained control theory when the trench he was working in collapsed. The Montana Supreme Court overruled a line of cases that had "shifted the focus from the nature of the work performed to the existence of standard precautions. *Id.* at 397. The Montana Supreme Court explained:

> The distinction described in the Restatement between "ordinary" or standard and "special" precautions depends on whether the precaution is meant to counter a common or a peculiar risk. Employers are not liable for every tort committed by a subcontractor who is engaged in an inherently dangerous or hazardous activity. Rather, an employer is only vicariously liable for those torts which arise from the unreasonable risks caused by engaging in that activity. Restatement (Second) of Torts § 416 cmt. d illustrates the distinction. If a contractor is employed to transport giant logs over the highway, the contractor's employer is not liable for torts caused by the contractor driving in excess of the speed limit. Speeding is not an unreasonable risk particular to transporting logs, but is an ordinary form of negligence which is usual in the community and the prevention of which requires ordinary or standard precautions. However, an employer will be vicariously liable for the contractor's failure to take special precautions to anchor the logs to the contractor's truck. This is because transporting giant logs creates an uncommon hazard that the logs will become disengaged, a hazard not ordinarily encountered in the community which calls for particular precautions to prevent its occurrence.
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> Under the Restatement analysis, [employer of contractor] would not be liable to [plaintiff] if one of his coemployees negligently operated a pickup truck in the course and scope of his employment, resulting in injuries to [plaintiff]. The careful operation of a motor vehicle requires ordinary and standard precautions. In contrast, trenching, where workers are exposed to the risk of being buried if the operations are not safely conducted, requires the implementation of special precautions. These precautions may include sloping the banks of a trench, mechanically shoring a trench bank, or using a trench box. Such precautions, although arguably standard with regard to the risk posed, are special in that they are designed to protect workers from the unreasonable, extraordinary, and unusual risks associated with trenching operations. [*Id.* at 397-398.]

The Montana Supreme Court held that the district court erred in concluding that trenching could not fall within the doctrine "solely because [plaintiff's] injury could have been avoided through the use of 'standard' precautions." *Id.* at 398.

The Michigan Court of Appeals properly rejected the circuit court's reliance on *Rasmussen's* "fairly routine task" language. (Appellants' Appendix F, p 27a.) The *Rasmussen* decision does not indicate from which case it incorporated that language. However, similar language appears in *Bosak, supra.* This Court in *Bosak* used the same language to differentiate between a "fairly routine" activity without risks qualifying as inherently dangerous and those that are inherently dangerous "per se." *Bosak*, 422 Mich at 729. *The fact that an activity occurs routinely, is usual, or has reasonable safety precautions does nothing more than focus the attention on whether there might have been a collateral source of the danger.* That is all *Rasmussen's* and *Szymanski's* language means. As previously argued, DeShambo made an Offer of Proof that clearly indicates the inherent dangers of felling timber even with safety precautions. The Court of Appeals decision in this case is not clearly erroneous and is not in direct conflict with other opinions of this Court or the Court of Appeals.

III. A question of fact for the jury existed on whether the Nielsens could have reasonably anticipated the inherent danger present in a timbering operation, and the facts of the current appeal distinguish it from the mere homeowner public policy exception expressed in *Justus v Swope*

Michigan case law has recognized the inherently dangerous activity doctrine only where the individual against whom it was being applied was capable of recognizing the risks inherent in the activity. *Justus v Swope,* 184 Mich App 91, 96-97; 457 NW2d 103 (1990) (no evidence to support the conclusion that a homeowner had knowledge of risks involved in trimming a tree by the process of topping) (citing to *McDonough v General Motors Corp., supra*; *Vannoy, supra*; *Funk v Genl Motors Corp., supra*). This premise was reaffirmed in *Butler v Ramco-Gershenson,*

Inc., 214 Mich App 521; 542 NW2d 912 (1995) (parties contemplated the risk of falling bricks during restoration project but did not contemplate that pieces of precast coping block would fall and cause injuries; therefore, doctrine could not apply). A recognizable risk is one that is ***reasonably anticipated***. *Bosak,* 422 Mich at 728. See *Burger,* 202 Mich App at 312 (trial court denied motion for summary disposition and Court of Appeals affirmed because "reasonable minds could differ regarding whether the risk of danger [when standing on a wet pipe while cleaning within an air duct] was recognizable in advance"). *Samodai v Chrysler Corp,* 178 Mich App 252, 255; 443 NW2d 391 (1989) (trial court granted summary disposition and the Court of Appeals affirmed because changing light bulbs and using a forklift "are not reasonably anticipated as presenting peculiar risks or special dangers").

The Court of Appeals has concluded that when viewing whether the danger was recognizable at the time of the contract, the person making the recognition must be examined to determine their level of knowledge and understanding. *Justus,* 184 Mich App at 96-98. In *Justus,* the trial court granted summary disposition and the Court of Appeals affirmed because that homeowner who was having a tree removed was not "fully capable of recognizing the potential danger" that might occur to independent contractor's employee. This is a logical conclusion – if an individual does not have the expertise or knowledge to understand the nature of the risks in an activity, there can be no recognition of that risk.

The Court of Appeals in *Justus* focused on what knowledge the owner had regarding the activities such as safety and procedures. *Id.* at 97-98. The owner of the property in *Justus* was found to have no knowledge of the special procedures or risks in removing a tree from his property and testified at his deposition that he did not understand what was occurring. *Id.* at 98. The independent contractor was removing the tree by a process called "topping." "This involved

cutting a tree in sections from the top down and lowering the pieces to the ground by means of a rope swung through the crotch of a nearby live tree, especially utilizing a pulley system." *Id.* at 93. During the process of topping, the independent contractor's employee was injured. *Id.*

The Nielsens were not in the same position as the homeowner in *Justus, supra.* This is not a case, as in *Justus,* where a homeowner was entirely unaware of the danger of having one tree removed by the specialized procedure of topping. The present case shares certain aspects of the unpublished case in *Lyon* v *Burnett,* Michigan Court of Appeals No. 153442, September 22, 1994. The *Lyon* case involved a 1900-acre parcel of land on which a for profit timber cutting operation was being conducted. In *Lyon,* the Court of Appeals concluded that the question of whether felling timber was inherently dangerous, was one for they jury. As in *Lyon*, the present case involved compensation for the felling of timber. The Nielsens were to be compensated for the timber that was to be felled. (Appellants' Appendix L, pp Tr, pp 158a – 160a.) Further, the Nielsens were more sophisticated, as were the defendants in *Lyon,* concerning matters involving felling timber than the average person because they had several timber operations on their property in the 1970s as well as one in 1994. (Appellants' Appendix L, pp 156a – 157a.) The Nielsens were compensated in an amount of approximately $5,000.00 for the timber operation in 1994. (Appellants' Appendix L, p 157a.) Norman Nielsen recognized that felling trees was a risky business. (Appellants' Appendix L, 161a.) The Court of Appeals in this case recognized these considerations that distinguished the case before it from *Justus.* (Appellants' Appendix F, p 27a.)

MDCH does not contend that the scope of the timber operations in the current appeal are equal to those in *Lyon;* however, that fact does not preclude the Nielsens from being more sophisticated than the mere homeowner having a single tree cut by a special procedure. The

dangers inherent in the activities in the current appeal and *Lyon* are the same - gravity will pull a felled tree toward the ground and injure those that it strikes *en route*.

The dangers involved in logging a stand of trees are inherent in the general activity involved. In this case, the fact that a tree will fall and do great devastation to a human body that it strikes is a danger that is both inherent in the activity of felling timber and one that can be "reasonably anticipated" and does not involve any specialized understanding or knowledge. The trial court erred in concluding there was no genuine issue of material fact as to whether the Nielsens could have "reasonably anticipated" the inherent risks in felling timber at the time of the agreement between the them and Anderson. (Appellants' Appendix I, pp 87a – 88a.) *Actual recognition* is not the standard. Lack of "*specialized experience, information or expertise*" is not the standard as argued in Appellants' brief. (Appellants' brief, p 44.) Even if Anderson and Norman Nielsen did not discuss procedures for felling the timber, that does not exclude the Nielsens from the objective standard of "*reasonable anticipation.*"

There is a question of fact on which reasonable minds could differ as to whether the Nielsens could *reasonably anticipate* the danger of felling the timber. This is a question of fact that renders summary disposition inappropriate. *Groncki v Detroit Edison Co,* 453 Mich 644; 557 NW2d 289 (1996). The circuit court erred usurping from the jury the factual question of whether the Nielsens could have *reasonably anticipated* the dangers of the timber felling operation on their property. The Court of Appeals was correct in reversing the circuit court.

It is important to note that *Justus* involved a public policy exception. The facts of the case at bar distinguish it from *Justus* and remove it from the public policy determination protecting the "mere homeowner" from liability. *Justus, supra.* In *Justus* the Court of Appeals considered a narrow range of activities in which a homeowner needs basic "upkeep" or repairs

and does not have the knowledge or expertise to fully understand the risks. The Court in *Justus* stated:

> It is not reasonable to expect that a homeowner be required to educate himself as to the procedures and risks involved in activities such as tree removal, furnace maintenance, carpentry, or the like, to be performed at his home by an independent contractor. In essence, we must make a policy determination on whether the public interest is best served by imposing liability in a case such as this on a private homeowner, as opposed to the "expert" he hired to carry out the task at hand. [*Id* at 98. (Citation omitted.)]

The circuit court erred in concluding that the case at bar was within the public policy exception created in *Justus, supra.* It is undisputed that the Nielsens were to be financially compensated in an amount determined by the parties to be "fair." (Appellants' Appendix L, p 158a.) The addition of a compensatory element distinguishes the case at bar from *Justus,* from a public policy point of view because the homeowner in *Justus* hired the independent contractor to engage in an "upkeep" or "maintenance" type of activity involving no compensation to the homeowner. Further, the case at bar is distinguishable from *Justus*, *supra*, because the Nielsens had timber operations done on their property in the past and were compensated. Norman Nielsen also recognized that cutting timber was risky. The Court of Appeals in this case recognized these distinguishing factors. (Appellants' Appendix F, p 27a.) The public policy considerations in *Justus* are not served in the case on appeal. The Court of Appeals decision in this case is not clearly erroneous and is not in direct conflict with other opinions of this Court or the Court of Appeals.

Conclusion

Contrary to what Appellants contend, the inherently dangerous activity doctrine has not been overextended. Existing case law has set out reasons for treating employees of independent contractors engaged in inherently dangerous activities comparably to passer-by or bystander. The doctrine's absolute character based on the inherent dangers of the activity and the reality that employees rarely have control over safety procedures and methods dictate this result.

The Court of Appeals was correct in its holding that a question of fact existed as to what the Nielsens' knowledge of risks involving felling timber was at the time of the agreement with Anderson. Therefore, the trial court was in error in granting summary disposition. The Court of Appeals was correct when it noted, for purposes of the remand, that because evidence was presented regarding the inherent dangers of felling timber, the question of whether felling timber is inherently dangerous is one for the jury. The court also was correct when it noted that in past cases discussing whether an activity had to be "unusual," the issue was not dispositive.

Relief Sought

For these reasons, Intervenor-Appellee respectfully requests an issuance of an Opinion affirming the October 22, 2002, Opinion of the Michigan Court of Appeals reversing the circuit court's grant of summary disposition and holding that:

A. the inherently dangerous activity doctrine applies to employees of independent contractors engaged in inherently dangerous activities, or, alternatively, that the doctrine applies to employees not covered under workers' compensation;

B. a question of fact existed as to whether the Nielsens were able to recognize the inherent risks in felling timber at the time they entered into the agreement with Anderson, and, likewise, the Nielsens were not under the "mere homeowners" exception to liability;

C. when evidence is presented as to the inherent dangers of an activity, resolution of the question of whether the activity is inherently dangerous rests with the jury;

D. the existence of safety procedures or methods does not necessary preclude an activity from being inherently dangerous.

Respectfully submitted,

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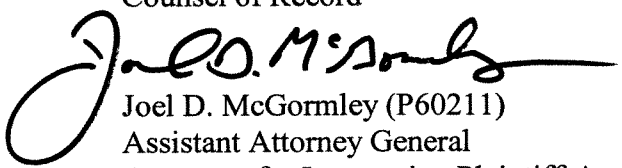

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